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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES E. DOYLE, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a federal court of appeals can affirm a conviction on one count of an indictment while reversing a second count of that same indictment when that reversal is based on the insufficiency of the evidence on a particular element that was common and critical to both counts.

2. Whether a conviction for transporting a bird from Montana to Texas, knowing such possession and transportation was unlawful under the laws of Montana, can stand when there is no evidence such possession and transportation was unlawful under Montana law.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES E. DOYLE, Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, James E. Doyle, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceeding on April 15, 1986.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit has not been reported but is reprinted in the appendix to this petition. It is found at page A-1.

JURISDICTION

This action was initially brought, by indictment, in the United States District Court for the District of Montana. Count I of the indictment alleged a conspiracy in violation of 18 U.S.C. §371; 16 U.S.C. §3372(a)(2)(A) and §3373(d)(1)(B). Count II of the indictment charged a Lacey Act violation of 16 U.S.C. §3372(a)(2)(A) and §3373(d)(1)(B) and 18 U.S.C. §2. Count III alleged a violation of the Endangered Species Act offense based on

16 U.S.C. §1538(a)(1)(E) and §1540(b)(1), 18 U.S.C.2 and 50 C.F.R. §17.11 and 17.21(3). The Petitioner was found not guilty of Count I, but guilty of Counts II and III. The judgment of the trial court was announced on January 24, 1985 and was filed and entered on February 1, 1985. Appeal was filed by the Petitioner on that same date, February 1, 1985.

Appeal of the Petitioner's convictions was taken to the United States Court of Appeals for the Ninth Circuit under the authority of 28 U.S.C. §1291. In a decision entered on April 15, 1986 that Court reversed the Petitioner's conviction on Count III of the indictment and affirmed his conviction on Count II. A Petition for Rehearing was timely filed by the Petitioner on April 28, 1986. The

Respondent, the United States, requested and was granted an additional thirty days in which to file its Petition for Rehearing and a Suggestion for Rehearing En Banc. Notwithstanding the grant of the extension, no such petition or suggestion was filed by the Respondent.

The Petition for Rehearing was denied on June 24, 1986. A copy of that Order is found in the Appendix to this petition at page A-21.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 20.1.

STATUTES INVOLVED

16 U.S.C. § 1538. Prohibited acts

(a) Generally. (1) Except as provided in section 6(g)(2) and 10 of this Act [USCS §§ 1535(g)(2), 1539], with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act [16 USCS § 1533]

it is unlawful for any person subject to the jurisdiction of the United States to--

. . .

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

16 U.S.C. § 3372. Prohibited acts

(a) Offenses other than marking offenses

It is unlawful for any person--

. . .

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce--

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law, . . .

50 C.F.R. § 17.7 Raptor exemption.

(a) The prohibitions found in §§ 17.21 and 17.31 do not apply to any raptor . . . or a golden eagle (Aquila chrysaetos) legally held in captivity or in a controlled environment on November 10, 1978, or to any of its progeny, which is:

(1) Possessed and banded in compliance with the terms of a valid permit issued under Part 21 of this chapter; and

(2) Identified in the earliest applicable annual report required to be

filed by a permittee under Part 21 of this chapter as in a permittee's possession on November 10, 1978, or as the progeny of such a raptor.

. . .

Montana Statutes, Article 87-5-203. Regulation of raptors. A person may not at any time hunt, capture, kill, possess, purchase, offer or expose for sale, or transport a raptor except as provided in this part.

Montana Statutes, Article 87-5-206. Restrictions on taking, possessing, and selling raptors.

. . .

(4) A person may not sell or offer for sale Montana raptors in this state. A person may not transport raptors out of the state except by permit issued by the department.

STATEMENT OF THE CASE

This case initially involved three Defendants, Burt J. Loessberg, Dr. Greg Moore (a veterinarian) and Dr. James E. Doyle, the Petitioner. At the time of the trial, Dr. Doyle was a forty-nine

year old physician, the father of five children, who was shown to have had no criminal record prior to this incident. The evidence revealed that Dr. Doyle has had an intense interest in birds since early childhood and has, for many years, used his medical and surgical skills to rehabilitate injured birds. One of the vehicles for this activity has been the Phoenix Bird Rehabilitation Center, a non-profit entity founded by the petitioner. The Phoenix Center rehabilitates approximately four hundred birds each year, many of which are brought to Dr. Doyle by the United States Fish and Wildlife Service and the Texas Department of Parks and Wildlife. The evidence revealed that Dr. Doyle invests between $32,000 and $36,000 per year of his personal funds in these bird rehabilitation efforts (Rt. 1213).

The first seeds of this incident date back to 1982 when Defendant Loessberg and the government's confidential informant, McPartlin, first met. The two men became friends with the result that Loessberg visited McPartlin at his home and viewed his captive breeding program. Sometime later, at the informant's suggestion, Loessberg contacted the Defendant Moore and the Petitioner Doyle, telling them of McPartlin's captive breeding program and the initial incubation date of some falcon eggs McPartlin then had in his operation.

The evidence showed that as early as June 1983, some ten or more months before McPartlin first contacted the Petitioner, McPartlin spoke to Defendant Loessberg about getting the Petitioner to buy a falcon. Indeed, the evidence

indicated that McPartlin brought up the subject of the Petitioner in some twelve conversataions between him and Loessberg, all of which were prior to the informer's first conversation with the Petitioner. It is clear that the government agent, McPartlin, had focused on the Petitioner long before he had any actual contact or communication with the Petitioner.

In fact, it was not until May 8, 1984 that the informant first spoke to the Petitioner. This came about when the agent-informer telephoned the Petitioner. At that time the Petitioner was operating a captive breeding program and he told McPartlin that he was interested in acquiring additional falcons in order to improve the genetic pool in his breeding operation.

The evidence at trial was uncontroverted that the sole purpose in the Petitioner's breeding operation was to assist in efforts to re-establish falcons in areas of west Texas where the population of these birds had declined. The Petitioner's interest in falcons was limited to propagation and rehabilitation; he had never practiced falconry and flew birds only as part of their rehabilitation. Once the birds were physically fit they were released in the wilds of west Texas. All of these efforts were a matter of record with the United States Fish and Wildlife Service.

Prior to McPartlin's initial call to the Petitioner, Defendant Loessberg had told the Petitioner about McPartlin's breeding program. Thus, when McPartlin called and told the

Petitioner he would have some falcon chicks hatching around May 19th or 20th, this information was consistent with what the Petitioner had learned earlier from Loessberg.

The informant offered to sell a falcon chick to the Petitioner, but told him the bird was illegal. The Petitioner, however, did not believe him because of McPartlin's widespread reputation as a liar and because the Petitioner also knew that McPartlin's breeding program would have some captive bred birds hatching at the same exact time as the birds offered for sale. Further, virtually every time they talked, the Petitioner insisted to the informant that he would be willing to take birds from McPartlin's captive breeding program only if these were accompanied by the required identifying

leg bands and legal permits from the State of Montana (Rt. 267, 335, 469, 764, 1237, 1240, 1241, 1243). McPartlin agreed he could and would provide the necessary documentation.

An agreement was reached wherein the Petitioner and Defendant Moore would each purchase a falcon from the government informer. On June 2, 1984, the Petitioner went to Great Falls, Montana and, after viewing McPartlin's captive breeding program and parent birds, he paid for the two young birds and transported them to Texas.

The bird purchased by the Petitioner on June 2nd was found by him to be a two week old falcon chick that fit in every detail what he had been led to expect from the incubation of the eggs in McPartlin's breeding program and that McPartlin had told him about in

their very first conversation. As early as May 8, 1984 a "time table" for these falcon eggs had been established by McPartlin when he said that his breeding program had falcon eggs that would hatch on May 19th or 20th. The existence of the falcon eggs and the expected hatch date was clearly established in the very first, unsolicited, call to the Petitioner from McPartlin. This first call, of course, was long before there was any agreement to purchase the chick.

It was in this context and with this knowledge that the Petitioner evaluated the situation at McPartlin's home and breeding operation on June 2, 1984. Considering the age and appearance of this chick, the chance of its having come from a source other than McPartlin's breeding program was very

remote. The probability of McPartlin being able to obtain a chick from the wild that was within days of the age of the chick from his breeding programs is too small to even be calculated. On June 2, 1984, therefore, the Appellant had before him hard evidence that the bird did, in fact, come from McPartlin's captive breeding program and not from the wild as McPartlin said.

A week prior to the Petitioner's trip to Great Falls he telephoned the Texas Department of Parks and Wildlife and put them on notice that he would be bringing two falcons to Texas from Montana. On his return to Texas the Petitioner again called the Texas Department of Parks and Wildlife and informed them he had, in fact, brought the falcons back from Montana. On June 29, 1984 the Petitioner was arrested at

his home at about 6:15 A.M. by five cars of government agents.

Evidence was received at trial that the informant McPartlin and his wife had received a total of approximately $61,000 from the Government as payment for their undercover activities. A veterinarian and three officers of the Montana Falconers Association, testified that McPartlin's reputation for truth and veracity was bad. Testimony was also received from professional colleagues of the Appellant who stated that his reputation for truthfulness was good.

At trial the Petitioner testified that he had never in his life sold a bird nor was he breeding birds for sale. Likewise, he said he was not breeding birds for purposes of falconry but rather to replenish the supply of birds

in the wilds of west Texas. This was an effort in which the Petitioner had been engaged for many years.

A jury in the United States Montana District Court for the District of Montana found the Petitioner and two co-defendants not guilty of conspiring to transport peregrine falcons from Montana to Texas knowing that such possession and transportation was unlawful under the laws of the State of Montana. (18 U.S.C. §371). The jury did, however, find the Petitioner guilty of Count Two of the indictment which alleged the actual possession and transportaion of two peregrine falcons from Montana to Texas knowing the possession and transporting of these birds was unlawful under the laws of Montana. This is the Lacey Act violation [16 U.S.C., §3372(a)(2)(A)].

The jury also found the Petitioner violated Count Three of the indictment in that he transported an endangered species, that is two anatum peregrine falcons, from Montana to Texas in the course of a commercial activity. This was in violation of 16 U.S.C. §1538(a)(1)(E). The two co-defendants were not guilty on all counts.

On review by the Court of Appeals for the Ninth Circuit the Lacey Act violation was affirmed, but the Endangered Species Act conviction was struck down because the evidence adduced at trial was insufficient to show the birds involved were, in fact, anatum peregrine falcons.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals acknowledged the evidence identifying the birds as anatum peregrine falcon was insufficient and reversed the conviction on Count Three yet they affirmed the conviction on Count Two although that was based on the same evidence.

This case is a matter of importance. It represents an incident that has become commonplace as the government has increasingly initiated and carried out criminal activities in the name of law enforcement and for the stated purpose of identifying and prosecuting the criminal element in our society.

The record in this case clearly shows that no law would have been violated in this situation but for the

activities of the government. Further, the record shows that in this instance the government was, in fact, breaking a more serious law (trapping and taking from the wild endangered species) in order to prosecute persons for a lesser evil (that is, taking such a bird across a state line). Such conduct by the government is even more reprehensible when, as in this case, the so-called criminal act is done by the citizen for a noble purpose - such as here.

Count Two of the indictment in this cause charged the Appellant with possessing and transporting, from Montana to Texas, "two (2) peregrine falcons" which he knew were possessed and transported unlawfully under the laws of the State of Montana. Similarly, Count Three of the indictment charged the Appellant with transporting,

in the course of a commercial activity, from Montana to Texas, "an endangered species, to-wit: two (2) peregrine falcons (falco peregrinus anatum)" without permission to do so as required by law. (See Appendix, p. A-22).

It is an elementary proposition, accepted by all, that in a criminal case the government has the burden of proving beyond a reasonable doubt every element of the offense charged, Moore v. United States, 429 U.S.20, 50 L.Ed. 2d 25, 97 S.Ct.29 (1976); Cool v. United States, 409 U.S. 100, 34 L.Ed. 2d 335, 93 S.Ct. 354 (1972); In Re Winship, 397 vs. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970). Both counts of this indictment clearly required that the government prove beyond a reasonable doubt that the birds the Appellant received and transported on June 2, 1984

were, in fact, peregrine falcons that had been trapped and taken from the wild. (Captive bred birds can be transferred and transported under conditions authorized by law. A peregrine falcon trapped and taken from the wild cannot be transferred or transported).

In the case of a captive bred falcon, the sub-species of a chick can be determined by ascertaining the sub-species of each of the chick's parents.

The evidence adduced at trial, however, showed that the only way to determine the sub-species of a falcon taken from the wild is to know the geographic area from which the bird was taken. The two birds involved in this matter were allegedly taken from the wild, therefore, in order for the

informer to say these were anatum peregrine falcons he had to know where the birds had been trapped. As the Court of Appeals wrote, McPartlin had no such knowledge and, therefore, could not identify the birds. Based on this conclusion the Court of Appeals struck down the Petitioner's conviction on Count Three of the indictment. By the same reasoning, however, in order to support a conviction on Count Two (that the birds were possessed and transported illegally under Montana law), it had to be shown the birds were illegal, that is, they had been taken from the wild as opposed to being from a captive breeding program. As the Court of Appeals held in reversing the endangered Species Act conviction, the only evidence regarding the origins of the birds was hearsay. Hearsay is not

competent evidence, Mima Queen v. Hepburn, 11 U.S. 290, 3 L.Ed. 348 (1812). If the evidence of the origin of the birds was insufficient on the one count, so it must be on the other.

In his brief to the Court of Appeals the Petitioner attacked the sufficiency of the evidence that he knew the falcons were possessed and transported unlawfully under Montana law. This was an acknowledgment that the primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals, Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974). It is likewise understood that the test for the sufficiency of the evidence, as described by this Court in Jackson v. Virginia, 443 U:.S. 307, 61 L.Ed.2d

560, 99 S.Ct. 2781 (1979) requires the evidence to be viewed in the light most favorable to prosecution and a verdict upheld if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The Court of Appeals, however addressed the question of the sufficiency of the evidence with the following:

> Doyle argues that there is no evidence that he knew the falcons were "possessed and transported in violation of Montana law". He argues that he had permits issued by the proper state agency and that these permits authorized possession and transfer of the falcons they described, so the possession and transfer could not be unlawful.
>
> ...It is true that the permits described the falcons that were transported, but Doyle knew that the origin of these falcons had been misrepresented. The Department told Doyle on the

> telephone that the transaction was illegal under Montana law and described to him how he was going to "cover" the transaction. Doyle participated in this cover. McPartlin again reminded Doyle of the illegality of the transaction when Doyle received the falcons in Montana.
>
> Doyle was fully aware that the falcons he was transporting were not captive bred. The jury had a rational basis to reject his argument. (Emphases added).

In other words, the Court reasoned that because the birds were illegal, the Montana permits were not valid and therefore the transportation of the falcons was illegal under Montana law. This conclusion, however, conflicts with the Court's holding that the Government failed to show by any credible evidence that the birds were illegal.

The Government's position throughout the trial was that the two

falcons in question had been illegally taken from the wild as opposed to having been captive bred. The opinion of the Court of Appeals addressing the Appellant's conviction under the Endangered Species Act spoke to this exact point, writing:

> "McPartlin had no first-hand knowledge of the falcons' origins. He was told by other government agents where the falcons had been trapped. This evidence is suspect because the man who allegedly trapped the nestling falcon was available (and actually at the court house), but the government elected not to call him."

Thus, that Court itself, came to the conclusion that there was no credible evidence as to the origin of these falcons. This undermined the conviction on the Endangered Species Act and so it must also reverse the Lacey

Act conviction. To hold that the evidence was insufficient for the one conviction, but adequate for the other is an inconsistency that cannot stand. These two positions are mutually exclusive of one another and logically irreconcilable.

The finding of the Court of Appeals that the evidence of the origin of the falcons was nothing more than hearsay is more than amply supported by the record. In point of fact, the following is the only evidence regarding the origin of the birds that was produced at the trial:

a. One of the falcons in question was received by McPartlin in a motel room in Salt Lake City. McPartlin received it from one Yancey Cox <u>who told him</u> the falcon came from Arizona where it had been trapped by someone named Roger Claude (Rt. 385, 387, 401, 562).

b. The second falcon was received by McPartlin from Agent Gavitt at McPartlin's home in Montana. "Someone" told McPartlin that this second bird had been taken from the wild in Utah by Yancey Cox and Jeff Shelberg (Rt. 388, 403).

c. Agent Gavitt testified he, himself, had no knowledge of the origin of the two falcons, other than hearsay, (Rt. 779).

d. Agent Schmidt said that McPartlin was not present when the birds were taken, (Rt. 213).

e. Agent Schmidt testified his only knowledge of the origin of the birds was based on hearsay (Rt. 215).

f. The only information McPartlin had regarding the origin of the two birds was what someone else had told him, (Rt. 403, 562).

The unreliable nature of the evidence of the origins of the birds is of particular note since the number of falcons produced by captive breeding

programs exceeds the number produced in the wild by a factor of three (Peregrine Fund Newsletter, Number 13, [1985]). Further, as the opinion of the Court of Appeals notes, at the time of the trial the government had possession of the birds and could have had positive identification made in open court. The government, however, did not do so.

There is no credible evidence in this case that these birds were taken from the wild or were otherwise "illegal." Thus, it follows that if the birds were not illegal, the Montana permits were, in fact, valid and, therefore, the birds were not transported in violation of state law. The holding of the Court of Appeals that the only evidence of the origin of the falcons was heresay requires the reversal of the Lacey Act conviction for

exactly the same reasons it demanded the setting aside of the Endangered Species Act conviction.

II.

In order to sustain the conviction the possession and transportation of the birds had to be unlawful under Montana law, yet the evidence was uncontroverted that the possession and transportation of the birds was lawful under the Montana law.

The Government entered into evidence two permits from the Montana Fish and Wildlife Department authorizing the Petitioner to transport the two birds in question from Montana to Texas. (Appendix, pp. 30, 31). These authorizations were signed by the Chief of the Law Enforcement Division of the Montana Fish and Wildlife Department, acting in his official capacity. That

official, R. H. Bird, testified at trial that these permits authorized the transfer of the specific falcons described in those permits. The birds described in these documents were the birds transported to Texas by the Appellant on June 2, 1984, thereby giving rise to this case. There was not a scintilla of evidence produced at the trial that indicated the Appellant participated, cooperated or contributed in any way to the obtaining of these permits from the State of Montana.

There can be no question but that the State of Montana issued the necessary permits and authorized the transfer of the two falcons in question. It may be that the reason Montana authorized this act was to cooperate with the federal government in "setting up" this citizen who, time after time,

insisted he would only participate in the transfer of these birds if the informant provided him with written authority from the State of Montana (Rt. 267, 335, 469, 764, 1237, 1240, 1241, 1243). The record is clear that absent such written authority from Montana, the Petitioner never would have left Texas to get the birds.

The record is clear the Petitioner relied on what he knew of McPartlin's breeding operations, what he observed with regard to the birds in question and how these compared to the captive-bred birds McPartlin had been talking about since their first conversation. The Petitioner also relied on his knowledge of the activities of the various state and federal wildlife agencies and the monitoring of McPartlin's falcon operations by the Department of Fish,

Wildlife and Parks of the State of Montana. That Montana agency, of course, was the source of the Petitioner's specific written authorization to possess and transport these birds from Montana to Texas. (See Appendix, pp. 30. 31).

The reason why Montana gave written authorization to transfer the birds is irrelevant. Montana did, in fact, authorize the transfer and, therefore, the transfer was not illegal under Montana law. If the transfer was not illegal under Montana law, the Appellant's conviction cannot stand.

This incident is an example of a criminal operation initiated and orchestrated by the government in an effort to arrest and prosecute a citizen who would not be law violator were it

not for the inducements of the Government.

The actions of the Government and the facts of this case in general demand that the processes and procedures used in the prosecution and review of this cause be given strict scrutiny. Here a particularly unsavory character was recruited by the government to identify and initiate contact with unsuspecting citizens for the sole purpose of inducing them into technical violations of the law. Specifically we have here an agent provocateur, paid, along with his wife, some $61,000 for talking a falcon enthusiast into buying and taking an allegedly "illegal" bird across a state line. The undisputed purpose behind this citizen's act was to improve the gene pool of his falcon breeding program with the goal being the

replenishment of the falcon population in west Texas. This was noted by the Petitioner when he was first called by the government undercover agent and, of course, such purpose is precisely the stated goal of the United States government in general and the Department of the Interior in particular. Yet, instead of cooperation or assistance, the citizen's efforts were rewarded with a criminal prosecution, instigated by the government's witness-for-hire.

CONCLUSION

For the reasons stated above, this Petition for Certiorari should be granted.

Respectfully submitted,

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August 22, 1986

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
vs.	)
	)
JAMES E. DOYLE,	)
	)
Defendant-Appellant.	)

CA No. 85-3015
DC No. CR 84-51-1-PGH

O P I N I O N

Appeal from the United States District Court for the District of Montana
Hon. Paul G. Hatfield, District Judge, Presiding
Argued and submitted November 7, 1985 at Seattle, Washington

Before: WRIGHT and REINHARDT, Circuit Judges, and SOLOMON (The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.), District Judge.

SOLOMON, Judge:

FACTS

James E. Doyle, appellant, was convicted on two counts for the illegal purchase and transportaion of an endangered species. We affirm in part and reverse in part.

Doyle is a physician who lives in Texas. He is interested in birds and runs a bird rehabilitation center. He breeds captive falcons, hoping to reintroduce them into areas in Texas where the native falcon population has drastically declined. Doyle's attempt to acquire wild falcons resulted in his prosecution.

Doyle was tried with co-defendants Burt Loessberg, a falconer, and Greg Moore, a veterinarian. In 1982, Loessberg met and befriended John McPartlin, the government's confidential

informant. In 1984, Loessberg told McPartlin that Moore and Doyle wanted to purchase peregrine falcons. Loessberg acted as an intermediary between Doyle and McPartlin to acquire them. McPartlin told Loessberg that he would obtain illegal wild anatum peregrine falcons for Doyle and Moore. McPartlin explained that he would mark the wild birds with a yellow federal band to falsely indicate that they were hatched in his captive breeding program. McPartlin repeatedly informed Loessberg that he must make Doyle aware of the illegality of the operation.

In May, 1984, McPartlin spoke directly with Doyle for the first time. Doyle acknowledged that he was aware that there were problems with the parentage of the birds. McPartlin told Doyle the details of the scheme. He

also reminded Doyle that the sale of wild falcons is illegal in Montana. Doyle and Moore spoke to McPartlin several times during the following month to arrange the details of the purchase. McPartlin obtained the necessary Montana raptor export permits.

On June 2, 1984, Doyle flew from Texas to Montana to purchase the falcons. McPartlin and an undercover agent of the United States Fish and Wildlife Service, posing as McPartlin's accomplice, showed Doyle the birds. McPartlin again reminded Doyle that the scheme was illegal. Doyle paid in cash for two birds, one for himself and one for Moore. Doyle was arrested at his home several weeks later.

Doyle, Loessberg, and Moore were indicted for conspiracy to violate the Lacey Act. Doyle and Moore were

indicted on two additional counts for violating the Lacey Act [16 U.S.C. §§ 3372(a)(2)(A) and 3373(d)(1)(B)] and the Endangered Species Act [16 U.S.C. §§ 1538(a)(1)(E) and 1540(b)(1)].

At the trial, the government relied primarily on recorded telephone conversations between McPartlin and the defendants to establish its case. Parts of several recordings were played to the jury. All nine of the tapes played by the government were admitted in evidence, and five tapes introduced by Doyle's co-defendants were also admitted. The co-defendants also played parts of three other tapes to refresh McPartlin's recollection, but these three tapes were not offered in evidence. The jury acquitted Loessberg, Moore, and Doyle on count 1 and

convicted only Doyle on counts II and III. Doyle appeals.

Doyle raises several issues on appeal. He asserts that: 1) the court reporter's failure to record the content of tapes played at trial requires a reversal; 2) the Montana statute, Mont. Code Ann. §§ 87-5-203 and 87-5-206(4), which is the basis of the Lacey Act violations is unconstitutionally vague; 3) there was insufficient evidence that Doyle knew that his possession and transportation of the falcons were unlawful under Montana law; 4) the court erred in a supplemental jury instruction on the legality of trapping anatum peregrine falcons; 5) there is insufficient evidence that the falcons bought and transported were anatum peregrine falcons; 6) the Endangered Species Act, 16 U.S.C. § 1538, is

unconstitutionally vague; 7) there is insufficient evidence that the falcons were transported in the course of commercial activity; and 8) the court improperly instructed the jury on commercial activity.

1. Tapes

Several tapes of conversations between McPartlin and the co-defendants were played at the trial. The court reporter did not record the contents of the tapes. Doyle argues that 28 U.S.C. § 753(b) requires a court reporter to record verbatim "all proceedings in criminal cases had in open court." He contends that failure to record the played tapes is reversible error.

Fourteen tapes were admitted in evidence. Doyle asserts that without knowing which portions of these tapes were played at trial, this court cannot

adequately evaluate his claim that there was insufficient evidence to convict. We disagree. These tapes were taken into the jury room, where the jury had the opportunity to listen to all or any portion of each tape because each was admitted in evidence in its entirety. We presume that the jury considered all available evidence in its deliberations. Moreover, because the tapes are available to this court as part of the record on appeal, the failure to record the portions played at trial does not prevent our determining the contents of the tapes.

Court reporters are required to record proceedings verbatim, 28 U.S.C. § 753(b), but the failure to do so does not require a per se rule of reversal. See United States v. Piascik, 559

F.2d 545, 548 (9th Cir. 1977), cert. denied, 434 U.S. 1062 (1978).

Parts of three additional tapes were played to the jury, but neither was admitted nor offered in evidence. (Doyle made no effort to comply with Rule 10(c) of the Federal Rules of Appellate Procedure which gave him a means of presenting the contents of these tapes before this court.) Doyle asserts he was prejudiced by the failure to record the portions of these tapes played at the trial, but does not explain in what respect the tapes were prejudicial. (That the tapes were not admitted in evidence did not prevent Doyle from listening to them, discovering the most damaging portions, and then pointing out how he might have been prejudiced.) Again it appears from his brief that his only argument is that we are precluded

from examining the entire record and therefore cannot determine whether the evidence was sufficient to sustain the conviction. Doyle is plainly wrong for two reasons. One, he, himself, argues that the three tapes do not constitute evidence. Two, these tapes were used by the government as part of its presentation. They contain material adverse to Doyle. Doyle has not been harmed by their omission from the record.

2. The Lacey Act Violation

Under the Lacey Act, 16 U.S.C. § 3372(a)(2), it is unlawful for any person to transport, sell, receive, acquire, or purchase in interestate commerce any wildlife taken, possessed, transported, or sold in violation of any state law. Under Montana law, it is unlawful to purchase, possess, or

transport a raptor (A raptor is a bird of prey, such as falcons, hawks, eagles, ospreys, and owls.) without a certificate, license, or permit issued by the Montana Department of Fish, Wildlife, and Parks. Mont. Code Ann. §§ 87-5-201, 87-5-203, and 87-5-206(4). Doyle was convicted of violating the Lacey Act on the basis of these Montana statutes.

a) Vagueness of the Montana Code provisions.

Doyle asserts that Montana Code Annotated sections 87-5-203 and 87-5-206(4) do not give a person of ordinary intelligence fair notice of what conduct is forbidden. Doyle apparently asserts that the statute does not clearly prohibit a person who has a permit from transporting falcons even

when the permit is fraudulently obtained.

Doyle's argument has no merit. Under the Montana statutes, the illegal act must be committed knowingly in order to constitute a violation. This scienter requirement is sufficient to withstand any vagueness challenge. See Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952). Doyle's permit purported to cover birds bred and raised in captivity, but there is substantial evidence that Doyle knew these were wild falcons and that the permits were based on information he knew to be false. Doyle cannot escape the false representations made to obtain the permit. His vagueness challenge must fail.

b) Sufficiency of the evidence of Doyle's knowledge.

To determine whether there is sufficient evidence to support a guilty verdict, this court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original).

Doyle argues that there is no evidence that he knew the falcons were "possessed and transported" in violation of Montana law. He argues that he had permits issued by the proper state agency and that these permits authorized possession and transfer of the falcons they described (The numbers on the

falcons' leg bands matched the numbers on the Montana permits.), so the possession and transfer could not be unlawful.

Again Doyle's argument has no merit. It is true that the permits described the falcons that were transported, but Doyle knew that the origin of these falcons had been misrepresented. McPartlin told Doyle on the telephone that the transaction was illegal under Montana law and described to him how he was going to "cover" the transaction. Doyle participated in this cover. McPartlin again reminded Doyle of the illegality of the transaction when Doyle received the falcons in Montana.

Doyle was fully aware that the falcons he was transporting were not captive bred. The jury had a rational basis to reject his argument.

c) Supplemental jury instruction.

Doyle contends that the district court's response to a jury question during deliberation was inaccurate and requires reversal. The jury asked: "Can the anatum peregrine falcon be trapped legally for use in falconry?" [Falconry is the art of training falcons to pursue game or the sport of hunting with falcons. Webster's Seventh New Collegiate Dictionary 300 (1963).] The court answered, "No." Although there may be some ambiguity in the Montana law, [but see Mont. Code Ann. § 87-5-205(1)] the federal regulations are clear. Anatum peregrine falcons are an endangered species and may not be trapped for falconry. See 50 C.F.R. §§21.28(e)(3) and 21.29(e)(1)(iv).

Even if this instruction considered in isolation might be unclear, we must consider the jury instructions as a whole. See United States v. Green, 745 F.2d 1205, 1209 (9th Cir. 1984), cert. denied, 106 S. Ct. 259 (1985). When so considered, there is no ambiguity and no abuse of discretion. Here again, even if there was error, it was harmless.

3. Endangered Species Act

a) Sufficiency of the evidence that the falcons were anatum peregrine falcons.

The Endangered Species Act, 16 U.S.C. § 1538(a)(1), provides: "with respect to any endangered species of fish or wildlife . . . it is unlawful for any person subject to the jurisdiction of the United States to ... deliver, receive, carry, transport, or

ship, in interstate or foreign commerce ... any such species." It is undisputed that an anatum peregrine falcon is such an endangered species. See 50 C.F.R. § 17.11(h) at 73.

To convict Doyle, the government must prove beyond a reasonable doubt that the falcons which Doyle transported were anatum peregrine falcons (falco peregrinus anatum). Doyle contends that there is no credible evidence to show that the falcons were anatum peregrine falcons. We agree.

The government relied primarily on the testimony of McPartlin. He identified the falcons from memory, and through photographs, as anatum peregrine falcons. When asked how he knew the nestling falcon (newborn) was an anatum peregrine, he replied, "I base that on the fact that that is the only

subspecies of peregrine falcon that nests within the state from which that bird came in the wild state." He conceded that he could not conclusively make the identification on the bird's features. McPartlin also testified to the identity of the other bird, the immature falcon, by the location where it was trapped.

The government may establish the identity of an object through circumstantial evidence, United States, v. Sanchez, 722 F.2d 1501, 1506 (11th Cir.), cert. denied, 104 S. Ct. 2396 (1984), but here the circumstantial evidence was based on hearsay and should not have been admitted. McPartlin had no first-hand knowledge of the falcons' origins. He was told by other government agents where the falcons had been trapped.

This evidence is suspect because the man who allegedly trapped the nestling falcon was available, but the government elected not to call him. At the time of the trial, the government also had possession of the falcons which they had seized. Because of the age of the falcons, the government was in a position to make a positive identification. The government elected not to do it.

The government argues that McPartlin's identification of the immature bird was on the basis of its characteristics in addition to its place of origin. McPartlin's identification was contradicted by other evidence in the record. The physical features which McPartlin described were not sufficient to justify his conclusion, particularly when the government failed to bring in

other available evidence which would have positively established the species of the falcons.

Because we find that there was insufficient evidence to identify the falcon as an endangered anatum peregrine falcon, we need not reach the other issues raised by Doyle under the Endangered Species Act. In addition, because we reverse on count III, the Endangered Species Act count, involving the need to identify a specific subspecies, we find it unnecessary to dispose of appellee's motion to strike material attached to appellant's reply brief.

We AFFIRM the judgment of conviction on count II, the violation of the Lacey Act, and REVERSE on count III, the violation of the Endangered Species Act.

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	No. 85-3015
vs.	DC# CR 84-51 1-PGH
JAMES E. DOYLE, Defendant-Appellant.	O R D E R

Before: WRIGHT and REINHARDT, Circuit Judges, and SOLOMON (of the District of Oregon) Senior District Judge.

The Petition for Rehearing filed on April 29, 1986 has been considered and is DENIED.

INDICTMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

- - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
BURT J. LOESSBERG, JAMES E. DOYLE and GREGG MOORE	)
	)
Defendants.	)
	)

CR 84-51-GF
18 U.S.C. §371 and
16 U.S.C. §3372(a)(2)(A)
(5 yrs. and/or $10,000)
16 U.S.C. §3372(a)(2)(A)
(1 yr. and/or $10,000)
16 U.S.C. §1538(a)(1)(E)
and §1540(b)(1)
(1 yr. and/or $20,000)

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I N D I C T M E N T

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THE GRAND JURY CHARGES:

COUNT ONE

A. Introduction

At all times material to this indictment:

1. The defendant, JAMES E. DOYLE, was a resident of Arlington, Texas, and was engaged in the sport of falconry holding a permit as General Falconer.

2. The defendant, GREG MOORE, was a resident of Grapevine, Texas and was engaged in the sport of falconry holding a falconry permit.

3. The defendant, BURT J. LOESSBERG, was a resident of Grapevine, Texas and was engaged in the sport of falconry, holding a permit as a Master Falconer.

4. John Jeffrey McPartlin, was a resident of Great Falls, Montana, was engaged in the sport of falconry, holding a permit as a Master Falconer.

Mr. McPartlin served the United States Fish and Wildlife Service as a confidential informant providing the United States with information on the activities of the defendants, BURT J. LOESSBERG, JAMES E. DOYLE and GREG MOORE.

5. John Gavitt was a Special Agent of the United States Fish and Wildlife Service.

B. Conspiracy and the Objects of the Conspiracy.

1. From on or about March 19, 1984 until on or about June 2, 1984 in the District of Montana and elsewhere, BURT J. LOESSBERG, JAMES E. DOYLE and GREG MOORE, herein referrred to collectively as the defendants, did knowingly and willfully combine, conspire, confererate and agree together, and with each other to commit

an offense against the United States, to-wit: to knowingly engage in conduct that involved the sale and purchase of wildlife by knowingly transporting, receiving, acquiring and purchasing in interstate commerce, from Montana to Texas, wildlife, that is peregrine falcons with a market value in excess of $350.00, knowing that said wildlife was possessed and transported unlawfully under the laws and regulations of the State of Montana; specifically, Montana Code Annotated, Sections 87-5-203 and 87-5-206(4), in violation of Title 16 U.S.C. Sections 3372(a)(2)(A) and 3373(d)(1)(B).

C. Overt Acts

1. To effect the objects of this conspiracy, the defendants committed various overt acts in the District of

Montana and elsewhere, including but not limited to the following:

(a) On or about March 19, 1984, the defendant LOESSBERG advised Mr. McPartlin that the defendant MOORE and the defendant DOYLE were interested in purchasing peregrine falcons from Mr. McPartlin.

(b) On or about May 8, 1984, the defendant DOYLE agreed to purchase wild peregrine falcons from Mr. McPartlin.

(c) On or about May 17, 1984 the defendant LOESSBERG instructed Mr. McPartlin to obtain nonreusable federal raptor markers to facilitate the transportation of the wild peregrine falcons purchased by the defendants DOYLE and MOORE from Montana to Texas.

(d) On or about May 27, 1984, the defendant Moore agreed to purchase a

wild peregrine falcon from Mr. McPartlin.

(e) On or about June 2, 1984, the defendant DOYLE arrived in Great Falls, Montana and purchased for himself and the defendant MOORE two (2) peregrine falcons from Mr. McPartlin and Special Agent Gavitt.

All in violation of Title 18 U.S.C. Section 371 and Title 16 U.S.C. Sections 3372(a)(2)(A) and 3373 (d)(1)(B).

COUNT TWO

On or about June 2, 1984, in the District of Montana, the defendant JAMES E. DOYLE and GREG MOORE did knowingly engage in conduct that involved the sale and purchase of wildlife by knowingly transporting, receiving, acquiring and purchasing in interstate commerce, from Montana to Texas, wildlife, to-wit: two

(2) peregrine falcons with a market value in excess of$350.00 which the defendants knew were possessed and transported unlawfully under the laws and regulations of the State of Montana, specifically, Montana Codes Annotated, Sections 87-56-203 and 87-5-206(4), and in violation of Title 16 U.S.C. Sections 3372(a)(2)(A), 3373(d)(1)(B) and Title 18 U.S.C. Section 2.

COUNT THREE

On or about June 2, 1984 in the District of Montana, the defendants JAMES E. DOYLE and GREG MOORE did knowingly and without permission to do so as required by law, deliver, receive, carry, transport and ship in interstate commerce from Montana to Texas, in the course of a commercial activity, an endangered species, to-wit: two (2) peregrine falcons (Falco peregrinus

anatum) in violation of Title 16 U.S.C. Sections 1538(a)(1)(E), 1540(b)(1), and Title 18 U.S.C. 2, Title 50 Code of Federal Regulations Sections 17.11 and 17.21(e).

ADDITIONAL PENALTY: All vessels, vehicles, aircraft and other equipment used to aid in the importing, exporting, transporting, selling, receiving, acquiring or purchasing of wildlife in a criminal violation of Chapter 35 or 53 of Title 16 United States Code shall be subject to forfeiture to the United States.

A TRUE BILL

ELAINE G. MILES

_____

FOREPERSON

PERMIT FROM STATE OF MONTANA AUTHORITY TRANSPORTATION OF THE BIRDS

MONTANA

DEPARTMENT OF

FISH, WILDLIFE AND PARKS

1420 East Sixth Ave.
Helena, MT 59620
May 28, 1984

WRITTEN AUTHORIZATION TO EXPORT

Pursuant to Section 87-5-206(4), Montana Codes Annotated, the Department of Fish, Wildlife and Parks authorizes John J. McPartlin, RR 2037, Great Falls, Montana 59401 to export one Hy 84 peregrine falcon, sex unknown, yellow federal marker #R0031137.

Said falcon is currently possessed under captive propagation permit and will be permanently transferred from McPartlin to Dr. James Doyle, 1400 Paisley, Arlington, Texas 76015.

Sincerely,

(Signed - R.H.Bird)

R. H. Bird
Program Manager

RHB/rh
c: TX Parks & Wildlife

PERMIT FROM STATE OF MONTANA AUTHORITY TRANSPORTATION OF THE BIRDS

MONTANA

DEPARTMENT OF

FISH, WILDLIFE AND PARKS

1420 East Sixth Ave.
Helena, Mt. 59620
May 28, 1984

AUTHORIZATION TO EXPORT

Pursuant to Section 87-5-206(4), Montana Codes Annotated, the Department of Fish, Wildlife and Parks authorizes John J. McPartlin, RR 2037, Great Falls, Montana 59401 to export one Hy 1984 female peregrine falcon, yellow federal marker #R0031139.

Said falcon is currently possessed under captive propagation permit and will be permanently transferred from McPartlin to Dr. Greg Moore, 2802 Roundup Trail, Grapevine, Texas 76051.

Sincerely,

(Signed - R.H.Bird)
R. H. Bird
Program Manager

RHB/rh
c: TX Parks & Wildlife